88-1015

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MARIE CULLY,

PETITIONER,

v.

GRACE HOSPITAL,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Marie E. Cully
1384 West 83rd Street #7
Cleveland, Ohio 44102
(216) 651-8637

Petitioner and Attorney Pro Se

QUESTIONS PRESENTED

1. In a Title VII case, may summary judgment be granted without any indication of the reasons for the court's decision?

2. In a Title VII case, is summary judgment proper when the record discloses conflicting evidence relevant to plaintiff's job performance?

3. Is summary judgment properly granted in a Title VII case when plaintiff's motion to compel discovery of similarly situated employees' records and of employer's criteria for task performance is denied?

4. Was summary judgment in this case contrary to plaintiff's right to due process of law?

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NO.

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OCTOBER TERM, 1988

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GRACE HOSPITAL,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Marie Cully, respectfully prays that a writ of certiorari issue to review the order

entered June 20, 1988 in the Sixth Circuit Court of Appeal of the United States, affirming the summary judgment of the district court.

OPINIONS BELOW

The order of the district court granting summary judgment to defendant is unreported and is reproduced in the Appendix at App. 1-2. The order of the district court denying Plaintiff's Motion for Reconsideration is unreported and is reproduced in the Appendix at App. 3-4. The order of the Court of Appeals affirming district court is unreported and is reproduced in the Appendix at App. 5-6. The order of the Court of Appeals denying plaintiff's petition for rehearing is to the best of petitioner's Knowledge unreported and is reproduced in

the Appendix at App. 7-8.

JURISDICTIONAL STATEMENT

On June 20, 1988 a panel of the United States Court of Appeals for the Sixth Circuit dated and entered an order affirming the summary judgment of the district court. On September 23, 1988, the same panel, noting that a majority of the Sixth Circuit judges had not voted to grant plaintiff's petition for rehearing en banc, denied plaintiff's petition for rehearing. The jurisdiction of this Court is sought under Title 28, USC §1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendent V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law.....

STATEMENT OF THE CASE

This is a Title VII case of retaliatory discharge. Jurisdiction of the United States district court was invoked pursuant to 28 USC § 1343 (4), 42 USC § 2000e-5(f) (1) and (3), and 28 USC §2201 and § 2202. Plaintiff has appeared from the inception of this case as a pro se layperson at law, and has paid all applicable fees.

Upon the filing of the complaint, an initial order of the district court was entered directing that any motion for an extension of time to file an answer must be made within 20 days of service. Defendant was served as allowed by state law by certified mail and plaintiff perfected service by presenting the certified mail return receipt bearing defendant's Controller's signature to district court.

Defendant did not file a timely answer, and plaintiff filed a written request to enter the default and followed with a motion for default judgment. At that point, district court set the case for a default hearing and sent notice of the hearing to defendant, which then moved to file a late answer, citing the "excusable neglect" of defendant's controller in not forwarding the complaint to defendant's attorney. Defendant's motion to file a late answer was granted ex parte. Plaintiff moved for reconsideration which was denied.

Defendnat-employer moved for summary judgment, attaching plaintiff's supervisor's affidavit which stated that plaintiff failed to sucessfully draw arterial blood and refused training during her employment as a respiratory therapist.

Plaintiff countered with her affidavit stating that she did sucessfully draw arterial blood at least four times, and attached a record showing that fact made by the same supervisor during her employment; and plaintiff affirmed that she did not refuse training, but was in fact denied training that had been promised to her.

Defendant then filed another affidavit of plaintiff's supervisor which stated that the four sucessful attempts at drawing arterial blood listed on the employer's business record were not actually sucessful because plaintiff required instruction. Plaintiff attempted to file another affidavit stating that she was never told that requesting or accepting instruction would disqualify her sucessful attempts to draw arterial blood. District court did

not allow that affidavit of plaintiff to be filed, but granted summary judgment to defendant.

District court provided no reason for its summary judgment beyond the finding of no genuine issue of material fact. Plaintiff moved for reconsideration, which was denied, finding only that summary judgment was "properly granted in the first instance." Plaintiff filed a timely appeal and a formal appellate brief, making a request for oral argument. Defendant filed their appelle's brief, and plaintiff filed a formal reply brief and an appendix.

The Sixth Circuit did not allow argument or make any findings except, "Upon review, we conclude that the district court's judgement was correct." Plaintiff then filed a timely petition for rehearing en banc, which was denied, again without further findings.

REASONS FOR GRANTING THE WRIT

1. In a Title VII case, summary judgment is improper without some indication of the reasons for the court's decison. While this Court has held in Anderson v. Liberty Lobby that "there is no requirement that the trial court make findings of fact," (Anderson v. Liberty lobby, 477 US 242 at 250) that should not be taken as authorization for the result in this case: decisions of the district court and court of appeals that do not "...state the reasons for the determination and indicate the evidence relied on." (Goldberg v. Kelley, 397 US 254 at 271). Even advocates of increased use of summary judgments have proposed revising Rule 56 to state: "The court shall set forth its reasons in a written order or orally on the record." (Schwarzer, Summary Judgment; A Proposed

Revision of Rule 56, 110 FRD 213 at 215. Such approaches not only simplify review and satisfy litigants, they enhance the authority of federal common law by thier "decent respect for the opinions" of persons.

2. Summary judgment is improper in a Title VII case where the record contains conflicting evidence of employee's performance. Defendant in this case affirmed that plaintiff did not sucessfully draw any arterial blood samples. Plaintiff affirmed that she did. Defendant did not submit any performance evaluations which were signed by plaintiff or further materials to support its allegations. Granting summary judgment in such circumstances is an invitation to employers to have vague or non-existent performance standards and to make false assertions of employee incompetence.

Even if plaintiff's affidavits were inadequate in this case, it is significant that defendant's first affidavit was contrary to its own business record, the list of sucessful attempts at drawing arterial blood attached to plaintiff's first affidavit. After that business record was established on the courts record, the employer sought to show that the face of the record was not actually the truth, which by then was a weak argument at best. Other courts have found that similar unexplained revision of the facts when made by a Title VII plaintiff to be the basis for summary judgment against that plaintiff. (Wilson v. Westinghouse Electric company, 838 F2d 286 at 289)

3. Summary judgment was improper when plaintiff's motion to compel discovery was denied. Plaintiff sought co-workers records

to compare their performance to hers. Plaintiff also sought a specific step-wise procedure for drawing arterial blood, in order to show that she sucessfully completed all the steps in at least four cases. Thus, plaintiff was denied evidence that other employees were not treated as harshly as plaintiff and evidence that the employers proferred reason for discharge lacked credibility. Plaintiff's motion to compel discovery was denied by a marginal entry order, again without any reason given by the court.

4.Summary judgment in this case was contrary to plaintiff's right to due process of law. This court in Logan v. Zimmerman Brush Co., (455 US 422) found Title VII rights to be constitutionally protected property rights. If plaintiff's motion for a default judgment was not granted because of the Sixth Circuit's preference for a "decision on the merits," it seems preju-

dicial and inequitable that district court made no discussion of the merits in its summary judgment. The decisions rendered in this case have failed to provide plaintiff due process of law.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of cerriorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MARIE E. CULLY
1384 West 83rd Street #7
Cleveland, Ohio 44102
(216) 651-8637

Petitioner and Attorney Pro Se

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

NO. ____

MARIE CULLY,

PETITIONER,

v.

GRACE HOSPITAL,

RESPONDENT

PROOF OF SERVICE

STATE OF OHIO)
) s.s.:
COUNTY OF CUYAHOGA)

MARIE CULLY, after being duly sworn, deposes and says that pursuant to Rule 28.4 (a) of this Court she served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT on counsel for the Respondent by enclosing three copies thereof in

an envelope, first class postage prepaid,

addressed to:

Albert J. Rhoa
RHOA FOLLEN & RAWLIN CO., L.P.A.
1850 Midland Building
Landmark Office Towers
101 Prospect Avenue, West
Cleveland, Ohio 44115-1027

and depositing the same in the United States

Mails at Cleveland, Ohio on December 15, 1988.

Marie Cully

Marie Cully, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME this 15 day of December, 1988.

Kenneth Close Esq

Notary Public

My Commission has no appropriate date
ORC 147.03

APPENDIX

[FILED 1987 NOV 13 AM 11:04

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C86-5267

JUDGE ALICE M. BATCHELDER

MARIE CULLY

Plaintiff

v.

GRACE HOSPITAL

Defendant

O R D E R

Upon review of Defendants' motion for summary judgment, plaintiff's opposition and both parties' reply brief, the Court finds that there is no genuin e issue of material fact and that Defendant is entitled to judgment as a matter of law. Therefore, Defendant's motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

Dated this 13th day of Nov, 1987.

[Alice M. Batchelder]

ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

[FILED 1987 DEC 21 PM 1:29]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. c 86-5267

JUDGE ALICE M. BATCHELDER

MARIE CULLY

Plaintiff

v.

GRACE HOSPITAL

Defendant

O R D E R

Pursuant to Plaintiff's Motion to Reconsider and Defendant's Brief in Opposition, this Court finds that summary judgment was properly granted in the first instance and hereby DENIES Plaintiff's Motion to Reconsider.

IT IS SO ORDERED.

Dated this 21st day of December, 1987.

[Alice M Batchelder

ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

[FILED JUN 20 1988 JOHN P. HEHMAN, Clerk]

No. 88-3060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARIE CULLY,

Plaintiff-Appellant

v.

GRACE HOSPITAL,

Defendant-Appellee.

O R D E R

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed is this decision is reproduced.

BEFORE: MILBURN, GUY and NORRIS, circuit Judges.

Plaintiff appeals the district court's judgment granting summary judgment in favor of the defendant Grace Hospital. This case has been referred to a panel of the court

pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Upon review, we conclude that the district court's judgment was correct.

Accordingly, the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

[Leonard Green]

Clerk

[FILED SEP 23 1988 LEONARD GREEN, Clerk]

NO. 88-3060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARIE CULLY

Plaintiff-Appellant,

v.

GRACE HOSPITAL

Defendant-Appellee

O R D E R

BEFORE: MILBURN, GUY and NORRIS, circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the orginal judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that

the issues raised in the petition were fully considered upon the orginal submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Leonard Green]

Leonard Green, Clerk